BORA LASKIN LAW LIBRARY
3 1761 06094408 9

National and International Approaches to Reproductive and Sexual Health Law

Canadian Supplement

Professor Rebecca J. Cook

Faculty of Law
University of Toronto

2004-2005

These materials have been prepared exclusively for the use of students of the Faculty of Law, University of Toronto, and are not to be regarded as published.

BORA LASKIN LAW LIBRARY
SEP - 1 2004
FACULTY OF LAW
UNIVERSITY OF TORONTO

National and International Approaches to Reproductive and Sexual Health Law

Canadian Supplement

Professor Rebecca J. Cook

Faculty of Law
University of Toronto

2004-2005

These materials have been prepared exclusively for the use of students of the Faculty of Law, University of Toronto, and are not to be regarded as published.

Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

https://archive.org/details/nationalinternat00cook_1

National and International Approaches to Reproductive and Sexual Health Law
Canadian Supplement
2004-2005

Professor R.J. Cook
Faculty of Law
University of Toronto

TABLE OF CONTENTS

1. Introduction and Overview

The texts for the course are:

Cook RJ, Dickens BM and Fathalla MF. *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law*. Oxford: Oxford University Press, 2003 (Green book)

Canadian Supplement, 2004-2005

The Introduction and Overview are based on:

Green book: Reproductive and Sexual Health, 8-33
Green book: Evolution of Reproductive Health Law, 95-109
Green book: Case Study Methodology, 255-59

2. Legal Origins and Principles

A. Decision-Making
Green book: 109-119

Re Eve (1986) 31 D.L.R. (4th) 1 (S.C.C.) 1

Is sterilization done to a person, or for a person?

Colleen M. Olesen, "Eve and the Forbidden Fruit: Reflections on a Feminist Methodology," *Dalhousie Journal of Legal Studies* 3 (1994): 231-240 7

B. Regulation of Information
Green book: 120-127

3. Legal Origins and Principles

A. Competent Delivery of Services

Green book: 128-139, 144-148,

Standards for determining medical competence:

Zimmer v. Ringrose (1981), 124 D.L.R. (3rd.) 215. 12

Delegated authority: *Royal College of Nursing of the UK v. Department of Health and Social Security* [1981] 1 All ER 545 (House of Lords, England), 135. 17

See also:

Kealey v. Berezowski (1996) 136 D.L.R. (4th) 708 (Ont. H.C.)

McFarlane and another v. Tayside Health Board [1999] 4 All E.R. 961 (House of Lords, Scotland)

Cattanach v. Melchior [2003] HCA 38

B. Criminal Law

Green book: 144-47

R. v. Cuerrier (1998) 127 C.C.C. (3d) 1 (S.C.C.) 23

Contrast *Cuerrier* S.C.C., with BC Ct of Appeal decision, 141 D.L.R. (4th) 503 (B.C.C.A.) 29

See also:

R v. Williams [2003] SCJ No. 41.

Case comment- *R v. Williams* [2003] SCJ No. 41, Canadian HIV/AIDS Policy and Law Review 8(3) 50-53 (2003).

Bell-Ginsburg v. Ginsburg, 14 OR (3d) 217 Gen Div (action in tort by a spouse of a bi-sexual man permitted for fraudulent misrepresentation, battery and negligence - mere fact of exposure sufficient to allow cause of action)

Canadian HIV-AIDS Legal Network: www.aidslaw.ca

4. Implementation of Legal and Human Rights Principles

Green book: 216-252
- Human rights needs assessment
- Effectiveness of remedies

Review briefly: Green book: Reproductive Health Data, 405-427

Luisa Cabal et al., What Role Can International Litigation Play in the Promotion and Advancement of Reproductive Rights in Latin America?, Health and Human Rights 7 (2003): 50-89. 36

See also:

Center for Reproductive Rights (CRR) & Universidad de los Andes School of Law, Bodies on Trial: Reproductive Rights in Latin American Courts, CRR, 2003

Reproductive Rights in the Inter-American System for the Promotion and Protection of Human Rights, Center for Reproductive Rights, 2002, available: www.reproductiverights.org

5. Human Rights Principles

Green book: 148-186

Review briefly: III. 6. Human Rights Treaty Committees, General Recommendations, 463-509

Tutela No. T-505/92, Right of Sick Person/AIDS Patients, Constitutional Court of Colombia, Judgment No. T-505/92, August 22, 1992 in Goldman et al., International Dimensions of Human Rights, Inter-American Development Bank, 2001, 585-91 — 56

Tremblay v. Daigle (1989) 62 D.L.R. (4th) 634 (S.C.C.) (Headnote) — 63

Donna Greschner, "Pregnant with Meaning: Discourse, Democracy, and the Daigle Decision," in L. Samuelson and W. Antony (eds.), Power and Resistance (2nd ed.) (Halifax: Fernwood Publishing, 1998): 155-182 — 65

See also:

Committee on the Rights of the Child, General Comment - HIV/AIDS and the Right of the Child (2003)

Committee on the Rights of the Child, General Comment - Adolescent Health (2003)
General comments are available at:
http://www.unhchr.ch/html/menu2/6/crc/doc/comment.htm

6. Human Rights Principles

Green book: 187-215

Right to Receive and Impart Information- *Open Door Counselling and Dublin Well Woman v. Ireland* (1992) 15 E.H.R.R. 244. — 80

7. Fairness & Equity in Access to Reproductive & Sexual Health Care

Green book: Chapter 3: Health Care Systems, 34-60 (review briefly for background)

Daniels, N., et al. 2000, "Benchmarks of fairness for health care reform: a policy tool for developing countries," *Bulletin of the World Health Organization*, vol. 78, no. 6, pp. 740-750, available at: http://www.who.int/bulletin/pdf/2000/issue6/0583.pdf 101

Gita Sen, Asha George & Piroska Östlin, "Engendering Health Equity: A Review of Research and Policy" Harvard Center for Population and Development Studies - Working Paper Series (12:2) February 2002, 4-11. 110

PAHO, "Evaluating the Impact of Health Reform on Gender Equity: A PAHO Guide" (23 April 2001) 118

Eldridge v. British Columbia (Attorney-General) 151 D.L.R. (4^{th}) 577. 140

Cameron v. Nova Scotia (1999), 177 D.L.R. (4th) 611 (N.S.C.A.). 150

Auton (Guardian ad Litem) v. British Columbia (Attorney-General) (2002) 220 D.L.R. (4th) 411 (B.C.C.A.). 164

See also:

Doyal, L., 2000, "Gender equity in health: debates and dilemmas," Social Science & Medicine, vol. 51, *no. 6, pp. 931-939*

Gosselin v. Quebec (Attorney-General), [2002] 4 S.C.R. 429.

8. Access to Emergency Contraception-Mode of Distribution
- Joanna Erdman

Dunn S & Guilbert E, Society of *Obstetricians and Gynaecologists of Canada*(SOGC) Clinical Practice Guidelines: Emergency Contraception (2003) 131 *Journal of Obstetrics and Gynecology of Canada* 1-7. 172

Grimes DA, Switching EC to Over-the-Counter Status (2002) 347 (11) *New England Journal of Medicine* 846-849. 179

College of Pharmacists of British Columbia, "Regulatory Basis for Pharmacist Independent Prescribing Emergency Contraception Pills," 27 September 2002. 183

Cook, RJ & Dickens BM, "Access to Emergency Contraception" (2003) 25(11) *Journal of Obstetricians and Gynaecologists of Canada* 914-916. 189

Erdman JN & Cook RJ, "Protecting Fairness in Women's Health" forthcoming in Colleen M. Flood, ed., *The Frontiers of Fairness*, Toronto: University of Toronto Press, 2005. 192

See also:

Green book:
Safety and Efficacy of Products, 142-44
Case study 4: Sexual Assault and Emergency Contraception, 287-97

R.J. Cook, B.M. Dickens, C. Ngwena and M.I. Plata, "The Legal Status of Emergency Contraception," Int'l Journal of Gynecology and Obstetrics 75 (2001): 185-191.

American College of Obstetricians and Gynecologists, "Emergency Oral Contraception," ACOG Practice Bulletin 25 (March 2001): 334-340.

9. Access to Abortion Services

Rodgers, S., "Abortion Denied: Bearing the Limits of Law" forthcoming in Colleen M. Flood, ed., *The Frontiers of Fairness*, (Toronto: University of Toronto Press, 2005) 217

Rodgers, S., "The Legal Regulation of Women's Reproductive Capacity in Canada" in Jocelyn Downie, Timothy Caulfield, and Colleen Flood, eds., *Canadian Health Law and Policy*, 2d ed. (Markham, ON: Butterworths, 2002), Part II (State Policy on Abortion), 333-343. 231

Kouri, R.P., "The Actualization of Reproductive Rights Through Access to Emergency Oral Contraception and Abortion in Quebec" forthcoming in Colleen M. Flood, ed., *The Frontiers of Fairness*, (Toronto: University of Toronto Press, 2005), Part II, "Abortion: a right compromised by restricted access." 237

Provincial Insurance Coverage:

Lexogest Inc. v. Manitoba (A.G.) (1993), 101 D.L.R. (4th) 523 (Man. C.A.). 243

Morgentaler v. Prince Edward Island (Minister of Health and Social Services) (1996), 139 D.L.R. (4th) 603 (P.E.I.C.A). 251

Access to Abortion Services: *Morgentaler v. New Brunswick,* [2004] N.B.J. No. 130 (QL) 255

"Bubble Zones" - Restrictions on Protest Activity:
Ontario (A.G.) v. Dieleman (1994), 20 O.R. (3d) 229. 261

See also:

Canadian Abortion Rights Action league (CARAL), *Protecting Abortion Rights in Canada: A Special Report to Celebrate the 15th Anniversary of the Decriminalization of Abortion* (Ottawa: Canadian Abortion Rights Action League, 2003), available online: http://www.caral.ca/uploads/caralreporti.pdf

Rebecca J. Cook and Bernard M. Dickens, "Human Rights Dynamics of Abortion Law Reform," Human Rights Quarterly 25 (2003): 1-59

World Health Organization (WHO), Safe Abortion: Technical and Policy Guidance for Health Systems, WHO, 2003

Rebecca J. Cook, Bernard M. Dickens and Mihai Horga, Safe Abortion: WHO Technical and Policy Guidance, Int'l Journal of Gynecology and Obstetrics 86 (2004) 79-84

10. Access to HIV/AIDS treatment: A South African Case Study - Lisa Forman

Snapshots of the Treatment Struggle in South Africa

Mr Justice Edwin Cameron, "The Deafening Silence of AIDS," first Jonathan Mann Memorial Lecture, XIII International AIDS Conference, Durban 10 July 2000. 272

Andrew Medlrum, "Treatment Free for All" The Observer, 23 November 2003. 276

Human Rights Implicated by a Lack of AIDS Treatment

Alicia Aly-Yamin, "Not Just a Tragedy: Access to Medications as a Right under International Law" (2003) 21 Boston U. Intl. L. J. 325, 336-344. 277

Green book: review
Right to life and survival, 162-166
Non-discrimination on basis of health status/disability, 207-209

The South African Case Study

Minister of Health and others v Treatment Action Campaign [2002] 5 S. Afr. L. R. 721 (S. Afr. Const. Ct).(excerpts) 282

Joan Fitzpatrick and Ron C. Slye, "Economic and Social Rights- South Africa- Role of International Standards in Interpreting and Implementing Constitutionally Guaranteed Rights," (2003) 97 Am. Jnl. of I.L. 669, 669, 675-680. 292

See also

Thiagraj Soobramoney v. Minister of Health (Kwa-Zulu Natal) [1998] 1 S.Afr. L. R. 765 (S. Afr. Const. Ct)

Government of the Republic of South Africa and Others v. Irene Grootboom and Others [2000] 11 B.Const. L.R. 1169 (S. Afr. Const. Ct.)

David Patterson and Leslie London, "International Law, Human Rights and HIV/AIDS," (2002) 80 Bulletin of the World Health Organization 964-969.

Lisa Forman, "The Imperative to Treat: The South Africa Government's Constitutional Obligations to Provide Antiretroviral Medicines," in (2003) 12:1 Health Law Review 9.

Kathyrn Garfort, Canadian Medical Necessity and the Rights to Health, (2003) 8:3 Canadian HIV/AIDS Policy and Law Review 63-69.

Green book:
Summary of International Guidelines on HIV/AIDS and Human Rights, 510-512
Case study 8- Counselling and Caring for an HIV-Positive Woman, 323-335
Case study 9- HIV Drug Research and Testing, 336-344

J.K. Krishna, "The Rights of the New Untouchables: A constitutional analysis of HIV Jurisprudence in India," Human Rights Quarterly 25 (2003): 791

B. Flanagan, HIV/AIDS and Human rights in Russia-Compliance and the Rule of Law, Osgoode Law Journal 39 (2001): 39-76

R.J. Cook and B.M. Dickens, "Human Rights and HIV-Positive Women," International Journal of Gynecology and Obstetrics 77 (2002): 55-63

R.J. Cook and B.M. Dickens, "Patient Care and the Health-Impaired Practitioner," International Journal of Gynecology and Obstetrics 78 (2002): 171-177

Canadian HIV-AIDS Legal Network: www.aidslaw.ca

OHCHR, UNAIDS, "HIV/AIDS and Human Rights International Guidelines: Revised Guideline 6, Access to Prevention, Treatment, Care and Support," UNAIDS/02.49E, August 2002, online: http://www.unaids.org/html/pub/Publications/IRC-pub02/JC905-Guideline6_en_pdf.pdf

UNAIDS, *2004 Report on the Global AIDS Epidemic*, UNAIDS/04.16E, http://www.unaids.org.

11. Fetal Protection and Conscientious Objection

A. Can fetal life be constitutionally protected?

Rodgers, S., "The Legal Regulation of Women's Reproductive Capacity in Canada" in Jocelyn Downie, Timothy Caulfield, and Colleen Flood, eds., *Canadian Health Law and Policy*, 2d ed. (Markham, ON: Butterworths, 2002), Part III (Judicial Interference with Pregnant Women in the Alleged Interest of the Fetus), 343-357. 296

Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.) 152 D.L.R. (4th) 193 304

Rebecca J. Cook and Bernard M. Dickens, "Human Rights Dynamics of Abortion Law Reform," Human Rights Quarterly 25 (2003): 1, 21-29. 317

See also:

R. v. Drummond, [1996] O.J. No. 4597.

R. v. Sullivan, [1991] 1 S.C.R. 489; *See also* the *British Columbia Court of Appeal decision* (1988), 31 B.C.L.R. (2d) 145

Dobson (Litigation Guardian of) v. Dobson, [1999] 2 S.C.R. 753.

Vo v. France, European Court of Human Rights, Application No. 53924/00, 8/VII/04

B. Conscientious Objection

Green book,
- Legal aspects:139-42
- Human rights aspects: 213-4
- *Janaway v. Salford Area Health Authority* [1989] AC 537 (HL): 519

Letters to the Editor, *Journal of Obstetricians and Gynaecologists of Canada (JOGC),* Feb 04, 1-2, and forthcoming in *JOGC*, Aug 04. 322

B.M. Dickens and R.J. Cook, "The Scope and Limits of Conscientious Objection," Int'l Journal of Gynecology and Obstetrics 71 (2000): 71-77. 324

Rebecca J. Cook and Bernard M. Dickens, "Human Rights Dynamics of Abortion Law Reform," Human Rights Quarterly 25 (2003): 1, 50-52. 331

Steven Smugar et al, Informed Consent for Emergency Contraception; Variability in Hospital Care of Rape Victims, Am J of Public Health 90: 1372-6 (2003). 333

www.consciencelaws.org
The website is entitled "The Protection of Conscience Project." Its purpose is to 1) advocate for protection of conscience legislation; 2) facilitate communication and co-operation among protection of conscience advocates; 3) provide legislative draftsmen with useful information.

12. Treatment of Infertility- Bernard Dickens

Cameron v. Nova Scotia (1999), *supra* (headnote). 337

Green book:
Medical aspects, 16-17, 30, 46
Ethical aspects, 307-09
Legal aspects, 309-10
Human rights aspects, 311-12
Case Study 6-a Request for Medically Assisted Reproduction, 305-314

Canada, Assisted Human Reproduction Act, 2004 339

B.M. Dickens and R.J. Cook, "Some Ethical and Legal Issues in Assisted Reproductive Technology," Int'l Journal of Gynecology and Obstetrics 66 (1999): 55-61 396

G.I. Serour and B.M. Dickens, "Assisted Reproduction Developments in the Islamic World," Int'l Journal of Gynecology and Obstetrics 74 (2001): 187-193 403

13. Wrap-up and Questions

Additional Research and Information Sources

Women's Human Rights Resources
(http://www.law-lib.utoronto.ca/diana/mainpage.htm)

Project of the Bora Laskin Law Library at the University of Toronto, Faculty of Law. The site is produced by the Women's Human Rights Resources group in consultation and collaboration with law librarians, lawyers, students, researchers, activists and human rights experts around the world.

Action Canada for Population and Development (ACPD)
(http://www.acpd.ca/)

ACPD mobilizes public support for international population and development issues. A non-partisan organization, ACPD focuses on the inter-relationships between population growth and structure, the environment, over-consumption, poverty, sexual and reproductive health and rights, gender equity and equality, human rights, migration, economics, and other development issues.

Canadian Women's Health Network (CWHN)
(http://www.cwhn.ca/)

Network of individuals, groups, organizations and institutions concerned with women's health. The CWHN recognizes the importance of information sharing, education and advocacy for women's health and equality. We work to build and strengthen the women's health movement in Canada and throughout the world.

Kaiser Network Organization
(www.kaisernetwork.org)

The Henry J. Kaiser Family Foundation is a non-profit, private operating foundation focusing on the major health care issues. The *Kaiser Daily HIV/AIDS Report* and the *Kaiser Daily Reproductive Health Report* provide daily email summaries of news stories with links to the original articles and a fully searchable archive.

Department of Reproductive Health and Research (RHR), World Health Organization (WHO)
(www.who.int/reproductive-health/index.htm)

The World Health Organization is the United Nations specialized agency for health. It was established on 7 April 1948. WHO's objective, as set out in its Constitution, is the attainment by all peoples of the highest possible level of health.

International Planned Parenthood Federation
(www.ippf.org)

The International Planned Parenthood Federation (IPPF) links national autonomous Family Planning Associations (FPAs) in over 180 countries worldwide. IPPF is committed to promoting the right of women and men to decide freely the number and spacing of their children and the right to the highest possible level of sexual and reproductive health.

Reproductive Health Gateway
(http://www.rhgateway.org/)

A search engine on reproductive health topics, intended for reproductive health professionals. Searches over 30 selected websites. Managed by the Johns Hopkins University Center for Communication Programs.

United Nations Population Fund (UNFPA)
(http://www.unfpa.org/)
The world's largest international source of funding for population and reproductive health programmes. Works to ensure universal access to reproductive health, including family planning and sexual health to all couples and individuals. UNFPA supports population

and development strategies, promotes awareness of population and development issues and advocates for the mobilization of the resources and political will necessary to accomplish change.

Alan Guttmacher Institute (AGI)
(http://www.agi-usa.org/)

Nonprofit organization focused on sexual and reproductive health research, policy analysis and public education. AGI publishes *Perspectives on Sexual and Reproductive Health, International Family Planning Perspectives, The Guttmacher Report on Public Policy* and special reports on topics pertaining to sexual and reproductive health and rights.